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No. 94-140

In the Supreme Court of the United States

OCTOBER TERM, 1994

AMIR PORAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the materiality of a false declaration, in violation of 18 U.S.C. 1623, is a question of law for the court, rather than an issue of fact for the jury.

2. Whether the government established that petitioner's false declaration was material to the grand jury's investigation.

3. Whether a district court may sentence a defendant to serve the home detention portion of a split sentence in a foreign country.

4. Whether the trial court acted within its discretion in admitting evidence under Rules 404(b) and 801(d)(2)(E) of the Federal Rules of Evidence and excluding character evidence from one witness on the ground that the witness lacked sufficient knowledge to give such evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 17 F.3d 660. The opinion of the district court (Pet. App. A25-A54) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. A petition for rehearing was denied on April 14, 1994. Pet. App. A23-A24. The petition for a writ of certiorari was filed on July 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of making a false declaration to a grand jury, in violation of 18 U.S.C. 1623. Pet. App. A2. He received a split sentence, pursuant to Sentencing Guidelines § 5C1.1(d)(2) and (e)(3) (Nov. 1, 1992), of five months' imprisonment and five months' home detention in Israel, and he was ordered to pay a $10,000 fine. *Id.* at A55-A56. The court of appeals affirmed the conviction, but vacated the home detention portion of the sentence and remanded for the district court to require service of petitioner's home detention in the United States. *Id.* at A1-A22.

1. Petitioner, an Israeli national, manufactures medical supplies in Israel. In the early 1980s, he established a medical supply company, IM, Inc., in New Jersey. Pet. App. A2-A4. Petitioner conspired with Colin Offenhartz, the President of Fraass Survival Systems, Inc. (Fraass), to divide the worldwide market for military bandages. Petitioner agreed that his company would not submit a bid, or would submit intentionally high bids, on contracts to supply the United States Department of Defense, and Offenhartz agreed that Fraass would not compete, or would bid high, on contracts in Israel and elsewhere. *Id.* at A5. Pursuant to that agreement, Fraass intentionally submitted a high bid on a contract solicited by the Israeli government in 1984. *Id.* at A5-A6. The Israeli government required a United States supplier on the contract, however, and tried to persuade Offenhartz to lower Fraass's bid. Offenhartz and petitioner then agreed that Offenhartz would lower his price, but would pay petitioner a $200,000 "commission" from the $800,000 contract. *Ibid.* After

Fraass received payment on the contract, Offenhartz gave petitioner a $200,000 check made out to "Credit Suisse," pursuant to petitioner's instructions. *Id.* at A6.

On May 17, 1989, petitioner voluntarily appeared before a grand jury after being notified that he was a target of an antitrust investigation. Pet. App. A6, A26. In his testimony, he denied rigging bids and disclaimed any knowledge of the $200,000 check from Offenhartz. He also stated that he never had any Swiss bank account in the 1980s, and that he had never heard of Credit Suisse. *Id.* at A6, A36; C.A. Joint Appendix 1733.

Subsequently, a second grand jury indicted petitioner on two counts of knowingly making material false declarations, in violation of 18 U.S.C. 1623. Count 1 charged that petitioner had falsely told the first grand jury that he had not received a $200,000 check issued by Fraass to Credit Suisse, a Swiss bank. Count 2 charged that petitioner had falsely said that he had never had a Swiss bank account. Pet. App. A2. Credit Suisse records introduced at trial showed that petitioner had opened the account into which the Fraass check was deposited in 1984, and that he subsequently had opened two other accounts in 1987 and 1989. *Id.* at A6 n.4, A33. After the jury was unable to reach a verdict on Count 1, a mistrial was declared. The jury convicted petitioner on Count 2. *Id.* at A31-A33.

2. The court of appeals affirmed petitioner's conviction, rejecting his numerous claims of error in a footnote. Pet. App. A3 n.1. With respect to the government's cross-appeal of the sentence, the court held that the district court had erred in authorizing petitioner to serve the home detention portion of his sentence in Israel. *Id.* at A16-A22. Noting the statutory responsibility of the court and the probation office to see that petitioner complies with the terms of his sentence, the

court of appeals concluded that the only way "to maintain the required supervision" is for petitioner to "serve his complete sentence in the United States." *Id.* at A21. The court observed that if petitioner "violate[d] the conditions of home detention * * * the district court might find it difficult, or even impossible, to bring [petitioner] before it to consider appropriate remedial measures."[1] *Ibid.*

DISCUSSION

1. Petitioner contends (Pet. 13-23) that the courts below erred in holding that the materiality of a false declaration, in violation of 18 U.S.C. 1623, is a question of law for the court. He further argues that that ruling conflicts with the decision in *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), petition for cert. pending, No. 94-514 (filed Sept. 19, 1994), in which the Ninth Circuit held that the issue of materiality in a prosecution for making a false statement in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001, is an issue of fact for the jury. Our certiorari petition in *Gaudin* challenges the Ninth Circuit's holding on materiality, and we believe that the petition in this case should be held pending the Court's disposition of our petition in *Gaudin*.

In our view, the courts below correctly treated the issue of materiality in this case as an issue of law for determination by the court. See *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929) ("the materiality of what

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[1] The court rejected the government's contention that the district court had erred in failing to enhance petitioner's sentence for attempting to obstruct justice. Pet. App. A9-A16. While indicating that it "might draw a different conclusion from the evidence," the court held that the district court's findings were not clearly erroneous. *Id.* at A16.

is falsely sworn, when an element in the crime of perjury, is one for the court"). The Ninth Circuit's holding in *United States* v. *Gaudin*, *supra*, does not squarely conflict with the decision in this case, because *Gaudin* did not involve Section 1623 and did not overrule existing Ninth Circuit precedent holding that materiality under Section 1623 and other perjury statutes is a question of law for the court. Nevertheless, if the Court grants certiorari in *Gaudin* and reviews the Ninth Circuit's holding, the Court's analysis is likely to illuminate the considerations relevant to determining whether the court or the jury is the appropriate body to determine materiality in a prosecution under Section 1623. Accordingly, the Court should hold the petition in this case pending its disposition of *Gaudin*, and should then dispose of this petition as is appropriate in light of that case.

2. Petitioner next contends (Pet. 23-30) that the record in this case does not support the district court's finding that his false denial about whether he had a Swiss bank account was material. That question involves only the specific record in this case and therefore is not of sufficient general importance to warrant review by this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the record fully supports the district court's determination that petitioner's false statement was material to the grand jury's investigation.

Contrary to petitioner's assertions (Pet. 24, 26, 29), the grand jury before which petitioner testified was investigating bid rigging. Pet. App. A6, A35-A36; C.A. Joint Appendix 1678. The question whether petitioner had a Swiss account into which money was paid in furtherance of a bid-rigging arrangement was material to the grand jury's investigation. Moreover, as the trial

court found, petitioner's denial of the existence of the Swiss bank account "contradicted the earlier grand jury testimony of the President of Fraass, Colin Offenhartz," and petitioner's testimony thus "had a natural tendency to cast doubt on the credibility of Offenhartz's testimony, and to foreclose the grand jury's line of inquiry in questioning [petitioner]." Pet. App. A36. Applying the standard of whether the misrepresentation had "a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed," *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted), materiality was established.

3. Petitioner contends (Pet. 30-31) that the court of appeals erred in vacating the district court's sentence of five months' home detention in Israel, imposed pursuant to Sentencing Guidelines § 5C1.1(d)(2) and (e)(3) (Nov. 1, 1992), as part of petitioner's minimum 10-month sentence of "imprisonment."[2] That contention lacks merit.

As the court of appeals held (Pet. App. A19-A21 & n.17), the probation office cannot reasonably supervise the conditions of home detention provided in this case unless home detention is served in the United States. The relevant statutes and Sentencing Guidelines provisions

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[2] As the court of appeals noted (Pet. App. A19-A20 & n.18), the provision for home detention is not the type of "discretionary" condition that a court may impose as a condition of probation following imprisonment (see Pet. 30-32). Part C of chapter 5 of the Sentencing Guidelines, under which home detention was imposed here, is titled "Imprisonment," and it is distinct from "Probation" (Part 5B) and "Supervised Release" (Part 5D). See also Sentencing Guidelines §§ 5B1.4(b)(20), 5F1.2 (Nov. 1, 1992) ("[h]ome detention may be imposed as a condition of probation or supervised release, *but only as a substitute for imprisonment*") (emphasis added).

are based on the assumption that a defendant sentenced to home detention will remain within the jurisdiction of a United States court and probation office.[3] No statute or Guidelines section provides for supervision by a foreign government or, as would be the case here (Pet. 38), by a private business firm operating in a foreign country. Those entities have no authority or responsibility under United States law to ensure compliance with the conditions of home detention or to bring petitioner to justice before a federal court if he violates the terms of the sentencing order. As the court of appeals thus found (Pet. App. A20), "[e]ven with this [electronic] monitoring [to be provided by an American company], there is no substitute for the supervisory role performed by the probation officer."[4]

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[3] A probation officer is required to supervise the terms and conditions of probation or supervised release. 18 U.S.C. 3601. Among other things, the probation officer must monitor the conduct of a releasee and immediately report any violation of the conditions of release to the court and the Attorney General. 18 U.S.C. 3603. If there is probable cause to believe a person has violated a condition of his release, he may be arrested by a probation officer with or without a warrant and taken before the court having jurisdiction over him. 18 U.S.C. 3606. The Sentencing Guidelines, moreover, define "home detention" as "a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance *by the probation office*." Guidelines § 5F1.2, Application Note 1 (emphasis added).

[4] In addition, this Court consistently has held "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Because Congress has not specifically authorized the home detention portion of a split sentence to be served in a foreign country, the district court

There is no conflict between the court of appeals' decision and *United States* v. *Pugliese*, 960 F.2d 913 (10th Cir. 1992). See Pet. 36-37. While the court in *Pugliese* suggested in dictum that it did not see any "direct impediment to authorizing a person on supervised release to leave the United States" (960 F.2d at 915), the court in fact denied a defendant's motion to serve his supervised release in Thailand. The court concluded that "the structure needed to support defendant's rehabilitative supervision is absent outside the United States," and stated that "[w]e are unaware of any U.S. federal administrative system in Thailand that is empowered or trained to provide the functions of a U.S. probation officer." *Id.* at 916. That is similar to the reasoning of the court of appeals in this case.

4. Petitioner contends (Pet. 40-46) that the trial court made several erroneous evidentiary rulings. Those rulings do not conflict with the decisions of any other court and do not involve any issue warranting review by this Court.

a. The trial court properly admitted evidence of petitioner's bid rigging under Fed. R. Evid. 404(b). Evidence concerning the bid-rigging conspiracy was admitted as background to explain the relevance of the grand jury inquiry into petitioner's knowledge of the $200,000 check and the Swiss account into which the check was deposited. Pet. App. A5-A6, A36-A39. The district court did not abuse its discretion in admitting the evidence for that purpose under Rule 404(b). See, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681, 686 (1988); *United States* v. *McMillon*, 14 F.3d 948, 954 (4th Cir. 1994); *United States* v. *Carty*, 993 F.2d 1005, 1011

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lacked authority to give the home detention provisions of domestic law extraterritorial effect.

(1st Cir. 1993); *United States* v. *Scarfo*, 850 F.2d 1015, 1019 (3d Cir.) (en banc), cert. denied, 488 U.S. 910 (1988). While petitioner suggests that various courts of appeals have articulated the rule for admitting "other acts evidence" somewhat differently (Pet. 44-46), petitioner has not shown that any of those variations in phraseology would have resulted in exclusion of the bid-rigging evidence in this case.

b. Petitioner next suggests (Pet. 42-43) that evidence of bid rigging was admitted through improper hearsay. The challenged evidence, however, was properly admitted as nonhearsay under the provision for admitting the declarations of co-conspirators, Fed. R. Evid. 801(d)(2)(E). The existence of a bid-rigging conspiracy was independently proved by the testimony of co-conspirator Colin Offenhartz and by a letter that petitioner wrote describing the bid-rigging arrangement. C.A. Joint Appendix 1841. Thus, contrary to petitioner's suggestion (Pet. 42-43), the question left open by *Bourjaily* v. *United States*, 483 U.S. 171, 181 (1987)—whether a court can rely on Rule 801(d)(2)(E) evidence alone to determine that a conspiracy has been established by a preponderance of the evidence—is not presented in this case.

c. Finally, petitioner's claim (Pet. 43) that he was denied the opportunity to present evidence of his good character is incorrect. C.A. Joint Appendix 547 (court expressly states that defendant is not precluded from presenting evidence of his good character, whether or not he testifies in his own defense). Contrary to petitioner's contention, he was permitted to elicit evidence from the witness in question, Bernard Laderman, regarding petitioner's reputation in the United States. C.A. Joint Appendix 893-895, 928-929. The only limitation on Laderman's testimony was that he was not

permitted to testify concerning petitioner's reputation for good character in Israel. That restriction was entirely justified, because Laderman, who did not speak Hebrew, had made only one brief visit to that country. C.A. Joint Appendix 900. Moreover, while petitioner called as witnesses several Israelis who would have been qualified to testify about his reputation in Israel, petitioner did not try to elicit that information from them.

CONCLUSION

With respect to the first question presented, the Court should hold the petition pending its consideration of the petition for a writ of certiorari in *United States* v. *Gaudin*, No. 94-514. With respect to the other questions presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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